Glass Fabricators, Inc. and Glass and Metal Solutions, Inc., alter egos *and* International Union of Painters & Allied Trades District Council 6. Case 08–CA–174567

August 23, 2017

ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On April 27, 2017, the General Counsel issued a complaint alleging that the Respondents, Glass Fabricators, Inc. and Glass and Metal Solutions, Inc., are alter egos and that they violated Section 8(a)(5) and (1) of the Act by engaging in certain conduct. On July 17, 2017, Respondent Glass and Metal Solutions, Inc. filed a Motion for Summary Judgment and a brief in support with exhibits attached, and on July 21, 2017, the General Counsel filed an opposition to the motion with exhibits attached.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, the Motion for Summary Judgment filed by Respondent Glass and Metal Solutions, Inc. is denied.[1] The Respondent has failed to establish that there are no genuine issues of material fact warranting a hearing and that it is entitled to judgment as a matter of law.

Dated, Washington, D.C. August 23, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MISCIMARRA, dissenting.

Contrary to my colleagues, I would issue a notice to show cause why Respondent Glass and Metal Solutions (GMS)'s Motion for Summary Judgment should not be granted. This case involves, among other issues, a dispute as to whether Respondent GMS, as an alter ego of Respondent Glass Fabricators Inc. (GFI), is responsible for the bargaining obligations of GFI, which has a collective-bargaining agreement with Charging Party Union. Section 102.24(b) of the Board's Rules and Regulations provides for the potential entry of summary judgment without a hearing, which may be warranted if there is "'no genuine issue as to any material fact"' and "'the moving party is entitled to judgment as a matter of law."' *Security Walls, LLC*, 361 NLRB No. 29, slip op. at 1 (2014) (quoting *Conoco Chemicals Co*., 275 NLRB 39, 40 (1985)).

Here, Respondent GMS moves for summary judgment to dismiss the complaint against itself on the ground that it is not an alter ego of Respondent GFI and submitted with its motion a sworn affidavit from its owner. Re-

[1] The General Counsel notes that the Respondent's motion was incorrectly filed with the Division of Judges rather than with the Board, and argues that to the extent that the Respondent failed to meet the filing deadline established by Sec. 102.24(b) of the Board's Rules and Regulations, the motion should be denied. In light of the fact that no party has shown that it was prejudiced by the Respondent's procedural error in filing its motion with the Division of Judges, we accept the motion as timely filed.

Contrary to the dissent, the General Counsel has demonstrated in his opposition to Respondent's motion for summary judgment that there are material issues of fact in dispute as to this issue warranting a hearing. Sec. 102.24(b) of the Board's Rules and Regulations provides:

> It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist.

Here, the pleadings, including the Respondent's denial of the complaint allegations that Respondent Glass and Metal Solutions, Inc. (GMS) is an alter ego of Respondent Glass Fabricators, Inc. (GFI), and its affirmative defenses asserting the same argument, indicate that a genuine issue exists as to this critical fact. In addition, Respondent GMS submitted an affidavit from GMS's owner providing its version of the facts, supporting its motion and controverting the relevant allegations of the complaint. In response, Counsel for the General Counsel asserted his position, summarily but sufficiently to comply with the Board's rules and precedent. See *KIRO, Inc.*, 311 NLRB 745, 746 (1993) ("Nor do we believe that it was incumbent on the General Counsel, during this motion stage of the proceeding, to set forth the precise facts on which he relies. The Board has no provision comparable to Rule 56(e) of the Federal Rules of Civil Procedure under which a moving party can set forth its version of the facts, and the other party must either admit or controvert with specific facts."). Specifically, Counsel for the General Counsel asserted that the marital relationship between the owners of GMS and GFI presents a factual issue warranting a hearing and that the General Counsel would introduce evidence to show that the Respondents have "substantially identical" ownership, management, business purpose, operations, equipment, customers, supervision, or centralized control of labor relations. See *ADF, Inc.*, 355 NLRB 81, 83 (2010), reaffirmed by and incorporated by reference in 355 NLRB 351 (2010). In light of the fact-intensive nature of the Board's alter ego analysis and the General Counsel's assertions, we find that factual issues remain unresolved and that a hearing is required.

spondent GMS argues that, based on the facts set forth in the motion and affidavit, as applied to the relevant law, GMS and GFI are not alter egos because they do not have substantially identical management, business purpose, operations, equipment, customers, supervision and ownership.

In his response, the General Counsel argues that the Board should deny Respondent GMS' motion, because by denying in its answer to the complaint that it is an alter ego of GFI and by presenting its version of facts in its motion and the affidavit, "Respondent GMS has put these facts into dispute." In addition, the General Counsel notes that a marital relationship between Respondent GMS's owner and Respondent GFI's owner is a factor supporting a finding of an alter-ego status. The General Counsel further argues that under Section 102.24(b) of the Board's Rules and Regulations, it "is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing." As such, the General Counsel simply expresses his disagreement with Respondent GMS' version of the facts by stating that "[a]n evidentiary hearing would permit [him] to introduce evidence to show that Respondent GMS and Respondent GFI have 'substantially identical' ownership, management, business purpose, operations, equipment, customers, supervision, or centralized control of labor relations, all factors the Board considers in finding an alter ego."

In my view, the General Counsel's response is deficient. As I found in *L'Hoist North America of Tennessee, Inc.,* 362 NLRB No. 110 (2015), and *Leukemia & Lymphoma Society*, 363 NLRB No. 124 (2016), when a party files a motion for summary judgment that fairly establishes the absence of any dispute as to material facts and that the party is entitled to judgment as a matter of law, the General Counsel must respond with something more than conclusory statements and at least explain in reasonably concrete terms why a hearing is required. Although an opposition need not be "supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing,"[1] the General Counsel, in response to a motion for summary judgment, must normally identify material facts that are genuinely in dispute: merely expressing his disagreement with the moving party's version of events is insufficient to meet the standard that governs summary judgment determinations. See *Trinity Technology Group, Inc*., 364 NLRB No. 133, slip op. at 2 (2016) (Member Miscimarra, concurring) ("[A] party's disagreement does not, standing alone, mean summary judgment should be denied.").[2]

Applying the above framework, I would find that the General Counsel's opposition is insufficient because, in response to Respondent GMS' motion and accompanying affidavit, it provides only conclusory assertions and makes no reasonable effort to identify what genuine disputes of material fact, if any, warrant a hearing. Specifically, a marital relationship between owners of Respondent GMS and Respondent GFI—the only fact the General Counsel's opposition identifies as a factor supporting a complaint allegation that the two companies are alter egos—is not only an undisputed fact, which does not require a hearing, but also far from a determinative fact establishing Respondent GMS' alter ego status. See *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 slip op. at 4 (2016) ("No single factor is determinative . . . to establish alter ego status."). The General Counsel's opposition otherwise fails to identify any contention or particular facts that support his theory that Respondent GMS and Respondent GFI have substantially identical management, business purpose, operations, equipment, customers, and supervision. Therefore, I believe the Board must issue a notice to show cause why Respondent GMS' motion should not be granted.

The Board's Rules and Regulations expressly provide for the potential entry of summary judgment, without a hearing, when there is no dispute as to material facts and when a party is entitled to judgment as a matter of law. When a party files a motion for summary judgment supported by affidavits establishing facts that appear to warrant judgment in that party's favor, the Board should not

[1] Sec. 102.24(b) of the Board's Rules and Regulations.

[2] I believe there is no merit in my colleagues' position—in reliance on Sec. 102.24(b) of the Board's Rules and Regulations and *KIRO, Inc.*, 311 NLRB 745, 746 (1993)—that the General Counsel's opposition in the instant case warrants denying Respondent's Motion for Summary Judgment. In *KIRO*, a Board majority denied a respondent's motion to dismiss, in part because the Board's rules do not require prehearing discovery nor do they require that the General Counsel provide documentary evidence in order to defeat such a motion*, and the majority* observed that the General Counsel "may not have responded to each and every factual assertion made by the Respondent in support of its motion." Id. at 746. However, unlike the instant case, it was "patently clear" in *KIRO* "that genuine issues of fact existed." Moreover, I agree with Member Oviatt, who dissented in *KIRO*, and who reasoned that the General Counsel cannot defeat a well-pleaded motion for summary judgment merely by making a "bald assertion that there are factual issues that must be resolved at a hearing." Id. at 747–748 (Member Oviatt, dissenting). As Member Oviatt aptly observed:

> *[T]o say that there are factual issues, when in fact there are none, does not make it so*. Were it otherwise, a party could always get a hearing on a legally insufficient complaint merely by claiming there were disputed factual issues when there really were none.

Id. (Member Oviatt, dissenting) (emphasis added).

deny the motion merely because the General Counsel says so. Whether the Board is deciding the merits or the appropriateness of summary judgment, the Board is required to resolve issues *without* affording the General Counsel any greater weight or credence than other parties.

In the instant case, I believe the Board is required to issue a notice to show cause why Respondent's Motion for Summary Judgment should not be granted. Because my colleagues find otherwise, I respectfully dissent.

Dated, Washington, D.C. August 23, 2017

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Philip A. Miscimarra, Chairman

NATIONAL LABOR RELATIONS BOARD